IN THE

SUPREME COURT OF THE UNITED STATES.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO,
Plaintiff in Error,
v.
SOLON L. WILEY,
Defendant in Error.
} No. 316.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF FOR PLAINTIFF IN ERROR.

CONSTANTINE J. SMYTH,

THOMAS D. CRANE,

J. J. BOUCHER,

Attorneys for Plaintiff in Error.

JAMES H. MCINTOSH,

Attorney for Defendant in Error.

STATEMENT OF THE CASE.

The National Exchange Bank of Tiffin, Ohio, plaintiff in error, brought an action in the district court of Douglas County, Nebraska, against Solon L. Wiley, defendant in error upon a judgment of the court of

common pleas of Seneca County, Ohio, rendered pursuant to a warrant of attorney authorizing a confession of judgment in favor of the holder of the instrument. In the Douglas County, Nebraska, district court there was judgment for the defendant, which was affirmed by the supreme court of Nebraska, and the plaintiff in error has prosecuted a writ of error to this court. The contention of the defendant sustained by the Nebraska courts was that the plaintiff was not the holder of the instrument in the Ohio court and that therefore that court did not have jurisdiction over the person of the defendant.

A statement of facts follows:

On the 26th day of April, 1884, Solon L. Wiley (hereinafter called the defendant), together with the Wiley Construction Co., borrowed $10,000.00 from the National Exchange Bank of Tiffin, Ohio (hereinafter called the plaintiff), and thereupon executed and delivered to the plaintiff a certain instrument in writing, of which the following is a copy (Record 82):

"EXHIBIT A."

$10,000.00. TIFFIN, Ohio, April 26, 1884.

October 1, 1884, after date, for value received, we jointly or severally promise to pay the National Exchange Bank, or order, at its office in Tiffin, Ohio, ten thousand dollars with 8 per cent. interest after maturity. And hereby authorizes N. L. Brewer, or any attorney-at-law in the United States, or elsewhere, to appear before any court of record, after the above obligation becomes due and waive the issuing and service of process, and confess judgment against us or any or either of us, in favor of the holder of this instrument for the amount then appearing due, together with costs of

suit, and thereupon to release all errors, and writs of errors, and waive all right to appeal, and stay of execution, in our behalf or in behalf of either of us.

Second trial. WILEY CONSTRUCTION CO. [SEAL]
S. L. WILEY, Pres't. [SEAL]
S. L. WILEY. [SEAL]

P. O., Greenfield, Mass.
Due Oct. 1.

Said note is endorsed on back as follows:

45170 May 9, 1887. Paid on the within $6,311.75.

The certificate of authority of the plaintiff bank expired March 17th, 1885, but it is still lawfully exercising its franchise for the purpose of liquidating its affairs. Upon the expiration of its certificate a portion of its assets was transferred to the Tiffin National Bank, organized at that time. Several of the officers of the plaintiff bank became officers in the new bank, among them being Mr. Naylor, a director, and Mr. Chamberlin, cashier, who became respectively president and cashier. The testimony of these officers appears in the record. There is absolutely nothing in the record indicating that the note in question was among the assets transferred to the new bank. Besides this, the testimony of the officers above named is positive and uncontradicted that it was not included in that transfer, but has always remained the property of the plaintiff bank and that they, as officers of the plaintiff bank, directed the bringing of the action in the Ohio court.

On July 31, 1899, the plaintiff filed its petition in an action on the note in the court of common pleas in Seneca County, Ohio, against the defendant and the Wiley Construction Co., alleging the execution and delivery of the note and the warrant of attorney to the

plaintiff, that the note was unpaid except as shown by the endorsements thereon, that there was "due the plaintiff on said note the sum of five thousand, seven hundred and seventy-two dollars and seventy cents, with interest at the rate of 8 per cent. per annum from the 9th day of May, A. D., 1887," and praying for judgment accordingly. A copy of the note and warrant of attorney was attached to the petition. (Record 81.)

In accordance with the terms of the warrant of attorney, one John Bender, an attorney-at-law, appeared and filed an answer, entering an appearance for the defendants, waiving the issuance and service of process and confessing judgment in favor of the plaintiff and against both defendants for the sum of $11,418.68, that being the amount due and for costs. (Record 83.) Thereupon judgment was rendered as follows (Record 83):

"NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, *Plaintiff*,
vs.
WILEY CONSTRUCTION COMPANY AND S. L. WILEY, *Defendants*.
} Cognovit.

This day came the plaintiff by its attorney; also appeared in open court, John Bender, an attorney-at-law of this court, and by virtue of the warrant of attorney annexed to the note, attached to the petition in said cause, shown to have been duly executed by said defendants, entered the appearance of said defendants, and waived the issuing and service of process in this action, and confessed a judgment on said note against said defendants, and in favor of said plaintiff for eleven thousand, four hundred and nineteen dollars and sixty-eight cents, being the amount of principal and interest due on said note, and for the costs taxed and to be

taxed, and released and waived all exceptions, errors and right of appeal in the premises.

It is, therefore, considered that said plaintiff recover of said defendants the sum of eleven thousand, four hundred and nineteen dollars and sixty-eight cents, being the amount of said note, with interest computed at 8 per cent. per annum, from the 9th day of May, A. D., 1887, and also its costs herein expended taxed at $6.50."

On June 22d, 1900, the plaintiff filed its amended petition against the defendant in the district court of Douglas County, Nebraska, alleging, among other things, that on July 31st, 1899, it recovered a judgment against Wiley Construction Co. and S. L. Wiley, duly given by the court of common pleas in and for the County of Seneca, State of Ohio, for the sum of $11,-419.68 and $6.50 costs of suit in an action then pending in said court; that S. L. Wiley and Solon L. Wiley were one and the same person; that no part of the judgment had been paid, and praying for judgment accordingly. (Record 3.)

The answer of the defendant (Record 4–7) contained a general denial. In addition thereto it was alleged that on April 26, 1884, Wiley Construction Company and the defendant signed a promissory note to the order of the National Exchange Bank, due October 18th, 1884, with eight per cent. interest after maturity. That on "the 2nd day of March, 1885, the Tiffin National Bank purchased, received and became the holder of said note, thence has been and still is the holder thereof, and the said plaintiff has never been the holder thereof, or in any way interested therein; nevertheless, this defendant is informed and believes, and upon information and belief states that said note forms the basis of the pretended judgment upon which

the said plaintiff now brings this suit." That the note was "outlawed." That neither the defendant nor Wiley Construction Company ever had any notice or knowledge of the pendency of the suit in the Ohio court or were served with summons or entered their appearance therein, that consequently the court was without jurisdiction to render the judgment and that same was void. That in December, 1885, the National Exchange Bank, plaintiff, commenced an action on the note in a court in the State of Connecticut against the Wiley Construction Company, and that at the October, 1886, term of that court a trial was had and judgment rendered in favor of the construction company; that thereupon under an agreement between this defendant and this plaintiff, this defendant paid the costs of that action, and such payment was received in full satisfaction of all claim against him on the note.

In another paragraph the warrant of attorney, as above set forth, is set out in full, coupled with the allegation that same is one of the provisions of the note and "that the said plaintiff pretends that pursuant to said provision of said note, one John Bender entered an appearance for said Wiley Construction Company and S. L. Wiley, in the court of common pleas of Seneca County, Ohio, on the 31st day of July, 1899, and there and then confessed judgment in favor of said plaintiff on said note," and that by reason of said confession of judgment, and not otherwise, the plaintiff claims to have recovered the judgment against the defendant. The prayer was for an injunction restraining the plaintiff from attempting to collect or enforce the judgment.

The plaintiff replied (Record 8-9) with a general

denial followed by allegations setting up the note and warrant of attorney, and that in accordance therewith, John Bender, an attorney at law entered the appearance of the defendant in the action and confessed the judgment sued on; that under the laws of Ohio the courts of that state were authorized to and had full power and jurisdiction to render judgment upon the warrant of attorney contained in said note, and that by reason of said warrant of attorney it was unnecessary that the defendant be served with summons or personally enter his appearance in the action.

Upon these pleadings the case was tried.

At the trial the plaintiff produced in evidence a transcript of the judgment of the Court of Common Pleas of Seneca County, Ohio, authenticated as provided by law, showing the rendition of a judgment July 31st, 1899, against Wiley Construction Company and S. L. Wiley, the defendant, on a warrant of attorney. (Record 81–84.)

It was admitted at the trial that Solon L. Wiley, the defendant, and S. L. Wiley were one and the same person. (Record 19.)

The deposition of J. M. Naylor, director of the plaintiff bank, and president of the Tiffin National Bank, was read by the plaintiff to the effect that the National Exchange Bank, plaintiff, was at all times the owner and holder of the note and judgment described in the pleadings and entitled to the proceeds thereof. (Record 23–30.)

The deposition of J. W. Chamberlin, cashier of both banks, to the same effect, was read by the plaintiff. (Record 30–34.)

The depositions of John McCauley and J. W.

Schaufelberger, two Ohio lawyers, to the effect that the laws of Ohio authorized the courts of that state to render judgments on warrants of attorney, were likewise read to the jury. (Record 34–41.)

The defendant then introduced in evidence "Exhibit E" attached to the deposition of J. W. Chamberlin, cashier, taken by the defendant. This exhibit was a record of certain meetings of the directors of the plaintiff bank held February 24th, 1885, and on March 2nd, 1885, wherein among other things it was recited that the corporate existence of the bank expired by limitation March 1st, that the bank would be succeeded by the Tiffin National Bank, and that the full board of directors were appointed to confer with a like committee from the Tiffin National Bank and agree upon a value to be placed on the transferable assets of the bank, including bank building and United States bonds, to be sold to Tiffin National Bank. There was also a report of the directors determining the value to be placed on the assets to be transferred. One of the items of assets is described as follows: "Net worth of discounts as per schedule $160,871.38;" (Record 67-69). No schedule is attached to the exhibit, nor does one appear in the record nor is there anything in the record to indicate that the note in question was included in the schedule. This was the only testimony introduced by the defendant in his attempt to show that the note had been transferred by the plaintiff bank to the Tiffin National Bank or to support his contention that the plaintiff was not the holder of the note when judgment was rendered by the Ohio court.

This was all of the defendant's testimony.

The plaintiff in rebuttal then read from the depo-

sition of J. W. Chamberlin, taken by the defendant, to the effect that several of the officers of the plaintiff bank at the time it went into liquidation became officers in the new bank, and the books and papers of the plaintiff bank including this note were kept in the vault and office room of the Tiffin National Bank under the direction and control of the board of directors of the plaintiff bank, and that this was also true at the time of the taking of the testimony and that they directed the bringing of the action on the note.

It was also shown by the testimony of Mr. Naylor that from time to time during this period of liquidation dividends had been declared to the stockholders of the National Exchange Bank from paper collected and that the note and warrant of attorney had never been out of the possession or ownership of the National Exchange Bank, plaintiff. (Record 30–41.)

At the close of all the testimony the plaintiff moved the court to direct a verdict in its favor, which motion was overruled.

The third, fourth and fifth instructions of which the plaintiff complains are as follows. (Record 12):

'Third. But you are instructed that under the law and the evidence in this case as it now stands, there is but one question for you to determine from the evidence, that is, was the plaintiff in the action in the court of common pleas of Seneca County, in which court judgment was rendered by confession for plaintiff July 31st, 1899, the holder of the note therein sued upon, and you have nothing whatever to do with any other question or argument on any other question. All other questions as to payment, etc., have been settled, so far as you are concerned, by the binding judgment of the Ohio court, and the burden of proving that the plaintiff

in said suit was not the holder of said note is upon the defendant herein."

"Fourth. You are instructed that as a matter of law in this case, it is presumed that the court of common pleas in Ohio acted regularly, and that the plaintiff in the action therein brought was the holder of the note therein sued upon and that said court had jurisdiction to render the judgment therein made and herein sued upon, and such presumption continues throughout this case until such time as it shall be overcome by a preponderance of the evidence that such were not the facts and the burden of showing by a preponderance of the evidence that such presumptions were not true is upon the defendant in this case as above instructed."

"Fifth. If you believe from the evidence that the plaintiff in the action in the court of common pleas of Seneca County, Ohio, when and wherein the judgment by confession was entered upon said note, was the holder of said note, then you should find for the plaintiff and assess its damages in the amount sued for, to-wit: $11,419.68, with interest thereon at eight per cent. from the 31st day of July, 1899, to February 4th, 1901, or the first day of this term of court, and add to this sum $6.50, the costs in the Ohio court, giving total in your verdict."

"But, if you do not believe from the evidence that the plaintiff was at said time the holder of the note therein sued upon, then you should find for the defendant generally."

As heretofore stated, the trial resulted in a verdict and judgment for the defendant, which judgment was affirmed by the supreme court of Nebraska. (Record 87–90.)

The holding of that court affirming the judgment is summed up in paragraph 3 of the syllabus:

"In an action on a foreign judgment taken under a

warrant of attorney authorizing any attorney-at-law to appear in any court of record and confess judgment against the makers of a certain note, in favor of the holder thereof, held (1) that such warrant was not a general authority to appear and confess judgment in any action instituted on the note, but was limited to the confession of a judgment in favor of the holder. (2) That the defendant was not estopped, by the judgment, to deny that the plaintiff was the holder of the note when such judgment was confessed. (3) That a judgment, confessed in favor of one, who at the time was not the holder of the note, was void for want of jurisdiction.'

There was no question at the trial but that the laws of Ohio authorized the courts of that state to render judgment in accordance with the terms of a warrant of attorney.

The supreme court of that state has so decided.

Spence v. Emerine, 46 Ohio St., 437–441.

Neither was there any contention that the enforcement of such judgments was contrary to the policy of the law of Nebraska. The supreme court of that state in the case of *Snyder v. Critchfield*, 44 Neb., 66, decided in 1895, has declared the law applicable to such judgments. Therein it is said:

"A judgment of a court of a sister state, authenticated as prescribed by act of congress, is conclusive here upon the subject-matter of the suit. An action thereon can only be defeated on the ground that the court had no jurisdiction of the case, that there was fraud in procuring the judgment, or by defenses based on matters arising after the judgment was rendered."

"A judgment entered in pursuance of a warrant of attorney, in a state in which such judgments are

authorized, has the same force, when sued on here, as a judgment on adversary proceedings."

"In an action on such judgment, payment of the debt before judgment, that the foreign action was barred by the statute of limitations, or any other defense which applied to the original cause of action cannot be availed of. The judgment itself is conclusive against such defenses."

Assignment of Errors in this Court.

1. The court erred in failing and refusing to give full faith and credit to the judgment of the court of common pleas of the County of Seneca, in the State of Ohio, and in not holding that such judgment was conclusive of the present controversy between the parties hereto; and that it entitled this plaintiff in error to judgment as prayed in its original petition herein as provided by article 4, section 1, of the Constitution of the United States, and by section 905 of the Revised Statutes of the United States.

2. The court erred in holding that the judgment of the court of common pleas of the County of Seneca, in the State of Ohio, in favor of this plaintiff in error was not conclusive that this plaintiff in error was the holder of the promissory note executed by the defendant in error and which promissory note was the subject of the action in said court and was the basis of the judgment rendered by said court of common pleas in favor of this plaintiff in error and against said defendant in error.

3. The court erred in not reversing the decision of the trial court and in not awarding judgment and execution thereon to this plaintiff in error in that the decision and judgment of said trial court failed to give

full faith and credit to the judgment of said court of common pleas of the County of Seneca, in the State of Ohio.

4. The court erred in holding that it was not reversible error for the trial court to submit to the jury the question whether or not the plaintiff was the holder of the note sued upon in the court of common pleas of the County of Seneca, in the State of Ohio, and in instructing the jury to find for the defendant in case they believed from the evidence that in the suit in said court the plaintiff was not the holder of the note sued upon in the action in said court, which instruction was in the following language, to-wit:

"If you believe from the evidence that the plaintiff in the action in the court of common pleas of Seneca County, Ohio, when and wherein the judgment by confession was entered upon said note was the holder of said note then you should find for the plaintiff and assess its damages in the amount sued for, to-wit, $11,419.68, with interest thereon at eight per cent. from the 31st day of July, 1899, to February 4th, 1901, or the first day of this term of court, and add to this sum $6.50, the costs in the Ohio court, giving total in your verdict."

"But if you do not believe from the evidence that the plaintiff was at said time the holder of the note therein sued upon, then you should find for the defendant generally."

5. The court erred in holding that the defendant in error was not estopped by the judgment of the court of common pleas of the County of Seneca, in the State of Ohio, to deny that the plaintiff in error was the holder of the note sued upon when such judgment was entered by said court, which holding of the court was in the following language, to-wit:

"That the defendant was not estopped by the judgment

to deny that the plaintiff was the holder of the note when such judgment was confessed."

6. The court erred in holding that the evidence was sufficient to support the verdict of the jury that the plaintiff in error herein was not the holder of the note sued upon in the action, in the said court of common pleas of the County of Seneca, in the State of Ohio, at the time judgment was rendered in said court in favor of this plaintiff in error and against said defendant in error.

THE PLAINTIFF CONTENDS.

1. That the answer does not state a defense to the plaintiff's petition, but instead, confesses same.

2. That in any view of the case there is no evidence in support of the finding that the plaintiff was not the holder of the note in the Ohio court.

3. That under the full faith and credit clause of the Constitution of the United States the judgment of the Ohio court is conclusive that the plaintiff therein was the holder of the note.

ARGUMENT.

First. The Answer Does Not State a Defense to the Plaintiff's Petition, but Instead, Confesses Same.

The petition alleges the recovery of a judgment on the 31st day of July, 1899, by the plaintiff against the defendant in the court of common pleas of Seneca County, Ohio.

The answer sets up the execution and delivery of a promissory note by the defendant to the plaintiff: "That on to-wit: The 2nd day of March, 1885, the

Tiffin National Bank purchased, received and became the holder of said note, thence has been and still is the holder thereof, and the said plaintiff has never been the holder thereof, or in any way interested therein;" that the note had in it the following provision: "And hereby authorizes N. L. Brewer, or any attorney-at-law in the United States or elsewhere, to appear before any court of record after the above obligation becomes due, and waive the issuing and service of process, and confess judgment against us, or any or either of us, in favor of the holder of this instrument, for the amount then appearing due, together with the costs of suit, and thereupon to release all errors and writs of errors, and waive all right of appeal and stay of execution in our behalf, or in behalf of either of us;" that "pursuant to said provision of said note, one John Bender entered an appearance for said Wiley Construction Company and S. L. Wiley, in the court of common pleas of Seneca County, Ohio, on the 31st day of July, 1899, and then and there confessed judgment in favor of said plaintiff on said note;" and that by reason of said confession of judgment the plaintiff claims to have recovered judgment against the defendant.

It thus appears by the answer itself that the defendant executed and delivered to the plaintiff a note and warrant of attorney authorizing any attorney-at-law to appear for him without process in any court of record and confess judgment against him; that pursuant to such authority, an attorney did appear for him in an action by the plaintiff against him on the note in a court of general jurisdiction and confess judgment against him; and that such judgment constituted the cause of action set up in the petition.

The answer thus brings this case clearly within the

case of *Teel v. Yost*, 128 N. Y., 387. That was an action on a judgment of a Pennsylvania court, which judgment, like the one sued on in the case at bar, was rendered on a warrant of attorney. Therein it is said, quoting from *Shumway v. Stillman*, 6 Wend., 453, as follows:

> "'That the judgment of a court of general jurisdiction, in any state in the Union, is equally conclusive upon the parties in all the other states as in the state in which it was rendered. This, however, is subject to two qualifications. First. If it appears by the record that the defendant was not served with process, and did not appear in person or by attorney, such judgment is void; and, second, if it appears by the record that the defendant appeared by attorney, the defendant may disprove the authority of such attorney to appear for him.' This case has been quite uniformly cited and approved as a leading case in subsequent cases in this state."

> "Under the authority of this rule, we do not see how the defendant could have been seriously prejudiced by the want of notice of the proceedings leading to the judgment, as it was competent for him to show in defense of this action that the power of attorney upon which the judgment proceeded was a forgery, and conferred no authority upon any one to appear for him and confess judgment thereon; but no such proof was given or offered upon the trial. The presumption, therefore, is that the note was the genuine obligation of the defendant and gave actual authority to the prothonotary, or any other attorney, to consent to the judgment authorized by it."

The case at bar is even stronger than the case above cited. Here there is not only a judgment in an action in which it appears by the record that the defendant appeared by attorney, but that defendant when sued on that judgment, not only does not attempt to

disprove the authority of the attorney to appear for him, but instead, alleges facts which show conclusively that the attorney had due authority to enter the appearance of the defendant and confess the judgment.

Second. That in Any View of the Case There is No Evidence in Support of the Defendant's Contention That the Plaintiff Was Not the Holder of the Note in the Ohio Court.

It will be remembered that in his answer the defendant sets up that on March 2nd, 1885, The Tiffin National Bank purchased the note in question and has at all times since owned it. It is further alleged that in December, 1885, this plaintiff brought suit in Connecticut on this note against the Wiley Construction Co., resulting in a judgment for the company at the October, 1886, term of the court; that it was thereupon agreed between the plaintiff and this defendant that if he would pay the costs of the Connecticut suit he should be relieved from all liability on the note; that he did pay such costs and such payment was received and treated by the plaintiff in full discharge of his liability.

It will be noticed that the suit in Connecticut by this plaintiff on the note and the agreement between this defendant and this plaintiff with reference to the payment of costs of that suit, were *almost two years after the time at which it is alleged that the note was transferred to the Tiffin National Bank.*

The only evidence produced by the defendant even tending to support his contention that the plaintiff was not the holder of the note is a report of a committee

of the plaintiff bank February 24, 1885, that they had agreed with a like committee of the Tiffin National Bank fixing the value of the discounts to be transferred to the latter bank as per schedule. As heretofore stated, this schedule is not in the record, and there is nothing to indicate that it contained the note in question. (Record 67–69.)

Opposed to this is the positive uncontradicted testimony of Chamberlin, cashier of both banks, and of Naylor, director of the plaintiff bank and president of the Tiffin National Bank, that the note has always remained the property of the plaintiff bank and that the Tiffin National Bank had never had any interest therein.

Clearly if the note had been so transferred, it would bear some evidence of that fact, some indorsement indicating an assignment. Nothing of the kind however appears. The original was in the hands of the attorney for the defendant at the time of the taking of depositions and several copies appear in the record.

The note was made payable to the National Exchange Bank; the National Exchange Bank brought the suit in the Ohio court and recovered the judgment; and, the National Exchange Bank brought the action in the Nebraska court on that judgment.

It is apparent that the fact that the plaintiff bank went into liquidation soon after this note became due, and transferred some of its assets to the Tiffin National Bank and that some of the officers in the plaintiff bank accepted official positions with the Tiffin National Bank has been seized upon by the defendant without any warrant whatever as the basis for his contention that

at that time the latter bank became the holder of the note.

Third. Under the Full Faith and Credit Clause of the Constitution of the United States, the Judgment of the Ohio Court is Conclusive That the Plaintiff Therein Was the Holder of the Note.

The assignment of errors that the Nebraska courts failed to give full faith and credit to the judgment of the Ohio court; that it was error to hold that the judgment of the Ohio court was not conclusive that the plaintiff was the holder of the note therein sued on and the defendant estopped to assert the contrary; and, that it was error to submit to the jury the question whether or not the plaintiff in the Ohio court was the holder of the note sued on in that court, will be discussed together under this subdivision.

The law is well settled that in actions in the courts of any state upon judgments of a sister state the defendant may always show as a complete defense, either that the court rendering the judgment sued upon did not have jurisdiction of the subject matter of the action, or did not have jurisdiction over the person of the defendant.

In the present action the jurisdiction of the Ohio court over the subject matter of the action cannot be, and was not, called in question because that was a transitory action, and the court was a court of general jurisdiction. The only question then remaining is whether or not the Ohio court had jurisdiction of the person of the defendant.

It was the contention of the defendant, sustained

by the Nebraska court, that the allegation contained in the answer that "the Tiffin National Bank purchased, received and became the holder of said note, thence has been and still is the holder thereof, and the said plaintiff has never been the holder thereof, or in any way interested therein," was a plea that the court which rendered the judgment did not have jurisdiction over the person of the defendant and that consequently it was competent to receive evidence to that effect.

In other words: If the plaintiff in the Ohio court was not the holder of the note, although the defendant appeared in the action, then, in the language of the Nebraska supreme court, the defendant "was never given an opportunity to defend and did not have his day in court;" while, if the plaintiff in the Ohio court was the holder of the note, then the defendant "was given an opportunity to defend and did have his day in court." Thus the jurisdiction of the Ohio court over the person of the defendant was made to depend not upon service of process upon him, or lack of such service; not upon the validity or invalidity of the warrant of attorney; but, instead upon whether or not the payee of the note sued upon had, or had not, transferred same.

The jurisdiction of the court over the person of the defendant was thus made to depend, not upon the status of the defendant in the action, but instead upon the status of the plaintiff in the action.

In the case at bar it is not controverted but that when the Ohio judgment was rendered there was a cause of action existing against the defendant for the amount of the judgment. It is likewise not controverted but that the Ohio court had power to grant the

relief sought in that action. The defendant being before it and owing that relief to some person, the sole and only point in controversy was whether or not he owed it to the plaintiff. That was a question which the court was competent to decide and its decision thereon is conclusive against collateral attack.

"In an action against a sheriff, for the escape through his negligence, of a judgment debtor, against whose person an execution had issued, and under which he was held in custody, the defense, that the plaintiff in the former suit was not the proper party to bring the action, is not available. The recovery of the judgment in that case is conclusive as to the right of the plaintiff thereto, upon the parties in this action."

Richtmeyer v. Remsen, 38 N. Y., 206.

To the same effect are—

Reed v. Spoon, 66 N. C., 415.

Fisher v. Williams, 57 Vt., 586.

Manifestly a plea by a defendant in an action that the plaintiff is not "the holder of the instrument sued on but has disposed of same" is no more nor less than a plea that the plaintiff is not "the real party in interest." Such pleas are very often met with in adversary proceedings because of the provision of the code that all actions must be brought in the name of "the real party in interest." It is never considered, however, that such plea calls in question the jurisdiction of the court over the person of the defendant, or that in sustaining, or in overruling such plea that it is thereby determined that the court has, or has not, such jurisdiction. It is simply a determination that *that particular plaintiff*, as distinguished from all other

persons, either has, or has not, the right to invoke the court to render judgment in his favor on the particular cause of action set up in the petition. Every petition must contain allegations showing that the plaintiff is the party entitled to maintain the action. If these allegations are wanting, the petition is insufficient. If they are contained in the petition then they may be controverted in that action by the defendant. If they are controverted by the defendant, then there is an issue of fact to be decided by the court prior to the rendition of judgment. But, whether controverted or not, a final judgment by the court in favor of the plaintiff is considered to be a finding and judgment that the plaintiff is the real party in interest, "the holder of the note," or of the claim sued upon and conclusive against collateral attack.

Whether or not the Plaintiff was the Holder of the Note is not a Jurisdictional Question but is Instead a Quasi Jurisdictional Question, and the Judgment of the Ohio Court is Conclusive Thereon.

A *quasi* jurisdictional allegation as distinguished from a jurisdictional allegation is one necessary to be made to authorize the court to render judgment, in favor of the plaintiff. It has nothing whatever to do with the jurisdiction of the court over the subject matter of the action nor over the person of the defendant.

It is an allegation which shows that the plaintiff is the real party in interest, the only person as distinguished from all other persons who has the right to invoke the court to render judgment in the action. It is an allegation, which, if omitted, would render the petition subject to demurrer as not stating facts suf-

ficient to entitle the plaintiff to recover. It is an allegation the want of which does not show that the court has not the necessary jurisdiction to grant the relief prayed for, but only that the court has not the necessary jurisdiction to grant that relief or any relief *to that particular plaintiff.*

But every authority is to the effect that if the court does proceed to judgment that then these allegations cannot be controverted in a collateral proceeding. In other words—*The judgment of the court is conclusive as to every allegation of fact necessary to be made by the plaintiff, and made by him, which shows a liability of the defendant to him.*

In 12 Encyc. Pl. & Pr. 211, it is said:

"When jurisdiction depends on a fact that is litigated in a suit, and such fact is found in favor of the party who avers jurisdiction, the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence thereof until set aside or reversed by a direct proceeding."

In the foot notes it is said:

"Where a court exercising general jurisdiction over the subject-matter of the litigation is presented with a case of such character that, before rendering final decree or judgment, it must determine whether it has jurisdiction to pass such judgment or decree, and it is passed, the jurisdiction cannot be assailed collaterally. * * * Whenever the right of a court to proceed in a particular case depends upon the existence and determination of certain jurisdictional facts, if it does determine such facts its decision is conclusive. * * * There is a clear distinction between those facts which involve the jurisdiction of the court over the parties and the subject-matter, and those *quasi*-jurisdictional facts without allegation of which the court cannot

be set in motion, and without proof of which a decree should not be pronounced. When such *quasi*-jurisdictional facts are proved, they are conclusive in a collateral proceeding."

A large number of cases are cited which sustain the text in every particular, among them the following:

Reinach v. Atlantic, etc. R. Co., 58 Fed., 43.

Betts v. Bagley, 12 Pick., (Mass.) 572.

Holcomb v. Phelps, 16 Conn., 132.

Wright v. Douglas, 10 Barb., (N. Y.) 97.

Ex Parte Stearnes, 77 Cal., 156.

Bostwick v. Skinner, 80 Ill., 153.

Wing v. Dodge, 80 Ill., 564.

Young v. Lorain, 11 Ill., 624.

Reinach v. Atlantic, etc. R. Co., 58 Fed. Rep., 43, is particularly applicable to the case at bar. The facts are stated in the syllabus:

"In a suit in a state court to foreclose a railroad mortgage, the trustees in a prior mortgage of a portion of the property filed a cross-bill, claiming priority. Thereupon a committee appointed for the purposes of a former litigation by holders of the bonds secured by such prior mortgage entered into a contract postponing payment thereof, subject to approval of the court. The nature of the committee's appointment was brought to the attention of the court, but it confirmed and proceeded to carry out the contract for extension. Held, that, as the court had jurisdiction of the subject-matter and the parties, the question of the committee's authority was only quasi-jurisdictional and the court's decision thereof, was conclusive, so that a federal court could not question the proceedings based thereon in a collateral proceeding brought by a bondholder who was a party to the contract

appointing the committee. Such bondholder's remedy was by appeal from the decree of the state court."

The distinction between jurisdictional and *quasi*-jurisdictional facts is stated by the court as follows:

"There is a clear distinction between those facts which involve the jurisdiction of the court over the parties and the subject-matter, and those *quasi*-jurisdictional facts, without allegation of which the court cannot be set in motion, and without proof of which a decree should not be announced. In the absence of the former the judgment of the court is void, and may be attacked in collateral proceedings, while in respect to the latter it is conclusive, and cannot be questioned except on review."

The case of *Holcomb v. Phelps*, 16 Conn., 126, illustrates the distinction drawn by the authorities. There is a clear statement of the law and the facts in the syllabus as follows:

"The decision of a court of competent jurisdiction, is conclusive upon the parties, as to the title claimed under it, and as to the facts directly put in issue and determined; so that such title or facts cannot be again contested, between the same parties, in the same court or any other. And where the court has a peculiar and exclusive jurisdiction, its decree is binding upon the judgment of any other court, in which the same subject comes immediately into controversy.

"These principles are applicable to the sentences of foreign courts and especially to the decisions in the several states of this Union, which, by the constitution, are to have the same effect in other states as in the states where they were made.

"Where the deceased, though born and educated in this state, had, for a long time, made the city of New York his place of business; had placed most

of his property there; had there left the evidence of his debts; and there his debtors resided; the surrogate of the City of New York, to whose jurisdiction the subject appertained, after a full hearing of the parties, granted administration to A, an inhabitant of this state, who took possession of the assets of the deceased, and removed them to his residence here; after which, B, one of the parties before the surrogate's court, took administration on the same estate from the court of Probate here, and then brought trover against A, for the chattels of the deceased, in his hands; it was held, that the decree of the surrogate's court afforded A, a complete protection, and consequently, the action was not sustainable."

A like conclusion in a similar case was reached in *Bostwick v. Skinner*, 82 Ill., 147, except that in this case the parties averring want of jurisdiction in the court appointing the administrator were not in court at the time of the appointment. The court said:

"The case would be quite different if the record itself disclosed that the intestate did not reside in Cook County prior to his death, or if the court could take judicial cognizance of the actual domicile of parties without proof."

Accordingly it may be suggested in the case at bar that this case would be quite different if the record itself disclosed that the plaintiff was not the holder of the note or if the court could take judicial cognizance of the actual holder of a note without proof.

The court cited and approved a former decision in this language:

"In *Fitzgibbon v. Lake*, 29 Ill., 165, ejectment was brought for certain lands and the defendant claimed under a guardian's sale. One of the objections made to the record of the guardian's sale was, that the petitioner was not guardian,

and had no authority to institute the proceeding, but the court said: 'Whether the petitioner was the guardian and had authority to institute the proceedings was for that court to determine when it heard the petition. It decided he was, by granting the order, and we can not reverse that decision here.'"

It is impossible to draw a distinction between that case wherein the judgment of a court that a certain party was a guardian and authorized to institute certain proceedings, was held to be conclusive, and the judgment of the Ohio court in the case at bar, wherein it was adjudged that the plaintiff was the holder of the note sued upon.

In *Betts v. Bagley*, 12 Pick., (Mass.) 572, Bagley was discharged as a bankrupt under the insolvent law of New York and later this action was brought by Betts, a creditor in Massachusetts, for the enforcement of his claim. That law required that two-thirds of the creditors of the insolvent should petition for the discharge and in this action it was contended that two-thirds of the creditors had not so petitioned.

The opinion is by CHIEF JUSTICE SHAW, and at page 582 he says, referring to the judge of the New York court: "If he had jurisdiction, then it follows that whether there were two-thirds or not among the creditors was a fact to be judicially tried and proved and one upon which the adjudication of the magistrate was conclusive, and one, of which the discharge setting forth that such fact was satisfactorily proved, is conclusive evidence."

In *Wright v. Douglass*, 10 Barb., (N. Y.) 97, it is said at page 99, "In respect to a court of general jurisdiction it is to be presumed that the court had jurisdic-

tion, *till the contrary appears.* But the want of jurisdiction may always be shown by evidence, except when jurisdiction depends upon a fact that is litigated in a suit, and is adjudged in favor of that party who avers jurisdiction. Then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction, until set aside or reversed, by a direct proceeding by appeal, or a writ of error."

In the case of Ex Parte Stearnes, 77 Cal., 156, the facts are stated in the syllabus as follows:

"When the superior court upon the return of *habeas corpus*, finds upon the testimony that the prisoner was in the custody of the officer in the county in which the court is held at the time of the service of the writ, and that he had the power to produce his body in answer to the writ, such adjudication is conclusive, and the action of the superior court in punishing the officer for contempt in refusing to produce the prisoner will not be reviewed in the supreme court upon *habeas corpus*, brought to relieve the officer from such punishment, upon evidence that the prisoner was out of the county at the time the writ was served, and that it was out of the power of the officer to produce him, because he was in the custody of the sheriff of another county."

At page 162 of the opinion it is said—"When jurisdiction depends on a fact that is litigated in a suit and is adjudged in favor of the party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction until set aside or reversed by a direct proceeding."

Young v. Loraine, 11 Ill., 624, was an action calling in question the validity of a sale made by a guardian under a judgment of the circuit court.

At page 637 it is said:

"When the jurisdiction is thus established, and the court is authorized to hear, it follows, as a necessary consequence, that it is authorized to adjudge, and that judgment being thus entered by authority of law, no matter how erroneous it may be, or even absurd, though it may be in palpable violation of the law itself, and manifestly against the evidence—is, nevertheless, binding upon all whom the law says shall be bound by it, that is, upon all parties and privies to it, until it is reversed in a regular proceeding for that purpose. While it remains a judgment, it cannot be inquired into, nor its regularity questioned in any collateral proceeding. In another action the inquiry is not whether the court acted properly, but had it a right to act at all? Was the judgment rendered in the exercise of an usurped power, or of a conferred authority? If the former, the whole proceeding is utterly void, everywhere. If the latter it is always obligatory, till reversed. The rule, then, is a very simple one, and ordinarily of easy application. The inquiry is not whether the proof was sufficient, but was such a case presented to the court as called upon it, under the statute, to act, to deliberate, and to decide? Was its aid properly invoked? If so, then the court acted within its jurisdiction, and every presumption is in favor of its judgment. Indeed nothing can be alleged against it now."

The case of *Simmons v. Saul*, 138 U. S., 439, is decisive of the case at bar. In that case one Robert M. Simmons at the date of his death was domiciled in Louisinia, and was possessed of a certain land claim which authorized the holder to locate same upon any of the unoccupied public lands of the United States. This was the only asset of the estate, and there were no debts, but there were certain heirs of the deceased who were in ignorance of the existence of this land claim. The law of Louisiana provided a public

administrator for such estates and required the parish court to grant administration to such administrator and to order the sale of assets to pay debts. In 1872, being forty-two years after the death of Simmons, such proceedings were had in the parish court that one David Magee was wrongfully and fraudulently appointed administrator of the estate and an order entered to sell the land claim, which was done, and the proceeds expended in paying the costs of administration, there being no other claims against the estate. The purchaser, who was a party to the fraudulent proceedings, located the claim upon certain lands in Wisconsin, and later, by purchase, these lands came into the possession of Harry R. Saul, a citizen of Pennsylvania. This was an action brought in the Circuit Court of the United States for the Eastern District of Pennsylvania by ten citizens of Louisiana, two of Mississippi and four of Texas, claiming to be the legal descendants of Robert M. Simmons, against said Harry R. Saul. Its object was to charge the defendant as former owner of the land in Wisconsin and compel him to account for the value of the lands, their rents and profits, and for damages resulting from the cutting of timber.

A demurrer to the bill was sustained in the court below and affirmed on appeal. On page 447 of the opinion the question in the case is stated as follows:

"The first and main ground of the demurrer in this case is, that the facts stated in the complaint show that the relief claimed by the complainants is barred by the judgment or decree of a court of competent jurisdiction; rendered in proceedings regular on their face, and which have not been attacked by any proceeding in that court, or in any appellate court. The bill alleged that the court

which rendered that judgment was without jurisdiction; that its proceedings in the matter did not conform to the statute under the authority of which it assumed to act; that the judgment itself was obtained by a fraud upon the court; and that necessarily the pretended succession sale had in pursuance thereof, from which the appellee derived title to the lands with respect to which he committed the wrongs complained of, was illegal and void as to complainants, who, as heirs of Robert M. Simmons, deceased, are the equitable owners of said property. The pleadings, therefore, at the outset, present to us these two questions:

"(1) The validity of the judgment of the parish court of Washington parish ordering the succession sale of the unlocated land claim of Robert M. Simmons, deceased, and the legality of the sale thereunder, irrespective of any question of fraud.

"(2) As to the fraud by which it is alleged the judgment in question was procured."

An examination of the law of Louisiana was then made by the court, and the conclusion reached that the parish court had original and exclusive jurisdiction over the administration of such estates, as the bill showed that one to have been, and that the petition filed in the parish court contained a sufficient recital of facts to give the court jurisdiction over that particular estate. The opinion then takes up one by one the allegations of the bill and disposes of them adversly to the complainants. One contention of the bill was that as the law of Louisiana provided a public administrator for such estates, the appointment of a person other than such public administrator was void. On page 452 the court quoted from the case of *Comstock v. Crawford*, 3 Wall., 396, 403, to the effect that this was a matter for the consideration of the parish coirt, "and its action respecting them, however irregular, cannot

be impeached collaterally." It was further contended in the bill that as the law of Louisiana required ten days notice of the sale to be given, while as a matter of fact none was given, the sale was void. The opinion, however, on page 453, disposes of that contention by holding that this was at most an error to be corrected on appeal or avoided in a direct action of annullment but could not be made the grounds on which the decree of the court can be collaterally assailed. It was further contended in the bill that the fraud practiced on the Louisiana court rendered the judgment void. This was likewise overruled, the court holding, "that fraud could not be pleaded to an action in one state upon a judgment obtained in another." The summing up of the judgment of the court is in the following language:—

"The order of the parish court of Louisiana granting, letters of administration was a judicial determination of the existence of the necessary facts preliminary to them.

"The parish court had unquestionable jurisdiction of the intestate estate or succession of Simmons.

"Whether the person appointed administrator by the parish court was or was not the public administrator, who, under the law of Louisiana then in force, was the only person to whom such administration could be committed, was a matter to be considered by the court making the appointment, and its judgment thereon cannot be impeached collaterally."

A statute of Ohio provided that in any action in that state on a contract of insurance made therein with a foreign insurance company, service of process on the resident agent of such company shall be "as effectual as though the same were served on the principal."

Judgment was rendered in Ohio in an action against an Indiana insurance company the only service of process being upon its resident agent, there being no appearance by the company. This court held in the case of *The Lafayette Ins. Co. v. French*, 18 How., 404, that such judgment when sued on in Indiana was "entitled to the same faith and credit in Indiana as in Ohio, under the constitution and laws of the United States."

It is impossible to distinguish that case from the case at bar. There the statute became a part of the contract of insurance, and the company agreed that in case of an action on the contract, service of process on the agent should be considered service upon it. Here, the defendant as a part of the contract of loaning entered into with the plaintiff bank expressly constituted "any attorney at law in the United States or elsewhere" his agent to appear before any court of record and "waive the issuing and service of process, and confess judgment against" him.

In that case the contract provided an agent upon whom service of summons might be had. In the case at bar the contract provided an agent, with authority to waive the "issuing and service of summons" and confess judgment against the party conferring the authority. There, this court held that judgment to be a valid judgment against the party to the contract, and entitled to "full faith and credit." Here, the Nebraska court denied "full faith and credit" to this judgment and held that the party to the contract might defend against the judgment upon the sole ground that the plaintiff was not the real party in interest in the court in which the judgment was entered.

It is clear that the defendant in that case would

not have been heard to urge against the judgment that the plaintiff was not the holder of the contract of insurance at the time judgment was rendered in Ohio.

This judgment has the same force and effect as a judgment on adversary proceedings.

Snyder v. Critchfield, 44 Neb., 66.

Clearly then, if the defendant had appeared in person in the Ohio court and judgment had been rendered against him only after a contested trial, he could not now be heard to insist that the plaintiff in that action was not the holder of the note at the time judgment was rendered. This proposition would seem to be conclusive in this case.

In the Nebraska court all jurisdictional questions were settled beyond controversy in favor of the plaintiff. They were that the Court of Common Pleas of Seneca County, Ohio, being a court of general jurisdiction, had jurisdiction of the subject-matter of the action, and jurisdiction of the person of the defendant through the appearance of an attorney authorized to appear by virtue of a valid warrant of attorney executed and delivered by the defendant. All other questions were *quasi*-jurisdictional only, and were necessarily passed upon by the Ohio court. The warrant of attorney authorized a confession of judgment in favor of the holder of the note. The trial court before rendering judgment must have decided *that the plaintiff in the action was the holder of the note.* It would not have rendered judgment unless it had been made to so appear. Consequently its decision upon this question necessary to be decided was conclusive as against a collateral attack.

Respectfully submitted, CONSTANTINE J. SMYTH,
THOMAS D. CRANE,
J. J. BOUCHER,
Attorneys for Plaintiff in Error.